

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION**

IN RE: ETHICON, INC. PELVIC REPAIR
SYSTEMS PRODUCTS LIABILITY
LITIGATION

Master File No. 2:12-MD-02327
MDL 2327

ETHICON WAVE 3 CASES LISTED IN
EXHIBIT A

JOSEPH R. GOODWIN U.S. DISTRICT
JUDGE

**MEMORANDUM IN SUPPORT OF DEFENDANTS' SUPPLEMENTAL MOTION TO
EXCLUDE AND NOTICE OF ADOPTION OF PRIOR DAUBERT MOTION AND
REPLY BRIEF OF ABBAS SHOBEIRI, M.D. FOR WAVE 3**

Defendants Ethicon, Inc., Ethicon, LLC and Johnson & Johnson (collectively, "Ethicon"), submit this supplemental memorandum in support of their motion to exclude certain opinions of Dr. Abbas Shobeiri for Ethicon Wave 1 cases, Dkt. Nos. 2073 (motion), 2077 (memorandum in support), and supporting Reply brief, Dkt. 2219, which have been adopted with respect to the cases set forth in Exhibit A of Ethicon's notice of adoption, filed contemporaneously herewith.

INTRODUCTION

The Court should preclude Dr. Shobeiri from offering opinions regarding alleged design defects of Ethicon's mesh products. In addition to the arguments set forth in Ethicon's briefings filed against Dr. Shobeiri for Ethicon Wave 1 cases, Ethicon submits that opinions related to design defect are unreliable because Dr. Shobeiri fails to explain how Ethicon's products are "more likely than not" the cause of certain injuries, including pain and dyspareunia.

LEGAL ARGUMENT

I. The Court should exclude Dr. Shobeiri's opinions on design defect.

In his report on TVT-O, Dr. Shobeiri opines broadly that “[i]n a woman presenting with groin pain and/or vaginal/mesh pain and sexual pain following placement of the TVT-O device, these symptoms are, more likely than not, associated with the material and placement flaws of the TVT-O described in this report.” Ex. B, Rule 26 Expert Report of Dr. Abbas Shobeiri on TVT-O at 5 (“TVT-O Rep.”); *see also* Ex. C, Rule 26 Expert Report of Dr. Abbas Shobeiri on Prolift at 6; TVT-O Rep. at 14, 21. Dr. Shobeiri’s general opinion is that the alleged design defects of the TVT-O cause pain and dyspareunia. Ethicon moved to exclude this opinion in their Wave 1 Motion, arguing that Dr. Shobeiri did not cite studies to support the opinion and that it was therefore not reliable. Although the Court has stated that Dr. Shobeiri cites “numerous studies” in support of unspecified opinions, Dkt. 2685, Mem. Op. and Order (*Daubert* Motion re: Abbas Shobeiri, M.D.), at 7, his deposition testimony submitted in connection with Ethicon’s Wave 1 Motion demonstrates that the risks that Dr. Shobeiri connects to the TVT-O product as “more likely than not” to cause injury in fact occur in the *absence* of the TVT-O.

For example, Dr. Shobeiri admitted in his deposition that pain with sex can occur in the absence of any surgery; that scarring can occur with any surgery; that nerve damage is common to all surgeries; and that pain with sex can occur with any vaginal surgery. Ex. D, February 27, 2016 Deposition of Abbas Shobeiri, M.D. Tr. 63:3-15; 70:4-7; 125:4-13; 125:16-126:2; 127:2-5. He further admits that encapsulation of mesh (i.e., the covering of mesh with a thick scar) can occur with *any* mesh product, and is “not unique to” TVT-O. 2/27/16 Dep. Tr. 128:1-5. He claims that TVT-O is associated with “an unacceptably high rate of chronic pain,” but when asked to explain that opinion, he referenced no studies and stated only that “you’re operating in a space that causes the kind of pain that is hard to get rid of and that’s unacceptable.” 2/27/16

Dep. Tr. 99:12-21 (interjection of counsel omitted). This circular reasoning fails to explain Dr. Shobeiri's conclusory opinions. In short, Dr. Shobeiri does not explain how, given all of these factors, he can still opine that when mesh is present, mesh is automatically "more likely than not" the cause of pain and dyspareunia. His failure to explain his reasoning renders his testimony unreliable and it should be excluded. *See, e.g., Lewis v. Johnson & Johnson*, 601 F. App'x 205, 209 (4th Cir. 2015) (affirming district court's exclusion of expert who failed to explain how he selected samples on which his opinions were based); *In re. Ethicon, Inc. Pelvic Repair Sys. Prods. Liabl. Litig.*, 2014 WL 186872, at *18 (S.D. W. Va. Jan. 15, 2014) (excluding opinion of expert Peggy Pence where she failed to explain the bases for her opinion that Ethicon's testing was inadequate).

CONCLUSION

For the reasons stated above, in addition to the arguments in its Wave 1 Motion, Memorandum of Law, and Reply Brief, Ethicon respectfully requests the Court grant its Motion to Exclude the Testimony of Abbas Shobeiri, M.D.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Christy D. Jones, certify that on this day I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the CM/ECF participants registered to receive service in this MDL.

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